IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR
CIVIL DIVISION

CIVIL SUIT NO. S2 – 23 – 82 – 2008

BETWEEN

GAN THIAN LEONG ……PLAINTIFF

AND

CHAN SIEW LEE @ CHIN SIEW LEE … DEFENDANT

GROUNDS OF JUDGMENT

The Defendant applies to strike out and/or stay the Plaintiff's Writ of Summons and Statement of Claim under Order 18 Rules 19 (1) (b) or (c) or (d) Rules of the High Court 1980. I dismissed the application and the Defendant appealed to the Court of Appeal. Herein are my grounds for dismissing the said application.

Background Facts

The Plaintiff claims that the Defendant had sent a series of emails to various third parties and published certain unfounded and defamatory allegations against the Plaintiff.

The said emails are contained in paragraph 5 of the Statement of Claim.

The Defendant admits that she issued the said e mails to the various parties, particulars of whom are rendered at paragraph 5 of the Statement of Claim.

The Plaintiff claims that he had on various occasions requested and demanded inter alia, that the Defendant withdraw her defamatory allegations as contained in r the said emails but till to date the Defendant has failed to accede to the Plaintiff's requests and demands.

Therefore, the Plaintiff brings this defamation action against Defendant.

The Defendant applied to strike out the Plaintiff's claim specifically under Order 18 Rules 19 (b) or (c) or (d) of the Rules of High Court 1980 or a stay of the Suit herein.

The Courts Findings

It is trite law that an application for striking out under 0 18 r 19 RHC should only be brought in an obviously unsustainable case. Refer to ***Bandar Builders Sdn Bhd v United Malayan Banking Corporation Bhd*** [1993] 3 MLJ 36.

The basis of the Defendant's application is unclear and seems to be premised on Order 12 r 7 RHC after the oral amendment was allowed by the SAR, however the body of the application is not the relief available to the Defendant as provided for under Order 12 r 7 RHC. Order 12 r 7 is for reliefs of an order to:

(i) Set aside the writ or service of the writ;

(ii) Set aside notice of the writ;

(iii) Declare that the writ or notice has not been duly served; or

(iv) Discharge any order giving leave to serve the notice out of the jurisdiction.

From the Defendant's affidavit in support in Enclosure 8, the main ground upon which the Defendant relies on for the court to strike out this suit is on the basis of forum non conveniens.

I agree with the submission of the Plaintiff's counsel that an application to strike out on the basis of forum non conveniens should not be brought under Order 18 Rule 19 RHC. The reason being, that

applications under 0 18 r 19 RHC should only be brought in situations where the Plaintiff's claim is obviously unsustainable.

Therefore, as correctly pointed out by the counsel of the Plaintiff that the Defendant should have premised his application under Order 92 Rule 4 RHC 1980 for an Order that this Court exercise its inherent jurisdiction to stay the proceedings should the same finds that it does not have the jurisdiction to hear the case. Refer to the case of ***Harrah's Operating Co. Inc (Trading as Harrah's Casino Hotel Lake Tahoe & Bill's Lake Tahoe Casion) v Wu Yun Shya Josephine & Another Appeal*** [2008] 4 MLJ 63 which supports the proposition that a stay application rather than a striking out application is the more appropriate course of action when challenging proceedings on the grounds of forum non conveniens.

Thus the Defendant failed to specify the correct provisions under which provisions of the RHC his application is premised upon. It is a fundamental principle of law that a party cannot take his opponent by surprise. This general principle was reiterated by Gopal Sri Ram JCA in the case of ***Cheow Chew Khoon @ Teoh Chew Khoon (Yang Berniaga Sebagai Cathay Hotel) v Abdul Johari bin Abdul Rahman*** [1995] 4 CLJ 127.

Therefore for the above reason alone, the application by the Defendant is defective, and hence the striking out application by the Defendant of the Plaintiff's claim fails. On this alone, I dismiss the Defendant's application for striking out with costs.

However, for completeness, I proceed to address the issue of Forum Conveniens which is used by the Defendant as an alternative prayer for stay of the Suit herein.

Forum Conveniens

As for the alternative application of the Defendant for a stay of the Suit herein on the basis of forum non conveniens, the legal principle has been laid down in the case of ***American Express Bank Limited v Mohamed Toufic Al- Ozeir & Anor*** [1995] 1 CLJ 273 which states:

> " … The fundamental principle in regard to the doctrine of forum non conveniens is that there is some other tribunal, having competent jurisdiction, in which case may be tried more suitably for the interest of all parties and also the ends of justice. The word "conveniens" however, means suitability and appropriateness of the relevant jurisdiction and not of convenience" .

Pursuant to the principle postulated, the Defendant has to show that:

- that the Australian Courts have competent jurisdiction;
- that the Australian Courts would be the more suitable and appropriate forum to try this action.

Issue which court has jurisdiction

The issue of the jurisdiction of the Courts would have to be determined first before this court embarked on the issue of Forum Conveniens.

The issue of jurisdiction is related to the Plaintiff's cause of action i.e. if the cause of action arose in Malaysia, then the Malaysian courts would have the appropriate jurisdiction to hear the Suit herein.

In the Suit herein, the Plaintiff's claim against the Defendant is essentially a claim in defamation for the tort of libel which is premised on a series of emails sent by the Defendant. The particulars of the recipients of the emails are stated in para 5 of the Statement of Claim.

In the context of our case, the cause of action arose at the point/place of the publication of the alleged defamatory remarks. Refer to the case of ***Ying Cheng Ang v Ang Taro Imanaka*** [1997] 4 MLJ 65.

Therefore the cause of action arose at the point when the recipients opened their emails which was sent to them by the Defendant. The Defendant submits that the Plaintiff has not expressly pleaded that the relevant emails were received and opened in Malaysia. However I am of the view that, from the particulars as stated in para 5 of the Statement of Claim, the recipients as pleaded are persons/officers in Sime Darby Berhad which is undisputed of a Malaysian Company.

This impliedly, though not expressly stated, that publication took place in Malaysia. Thus, in the contexts of this case, I am of the view that there is no necessity to expressly plead that the publication took place in Malaysia.

Therefore, based on the above reasons, the cause of action is in Malaysia. Hence the issue of whether the Australian being a more appropriate forum to hear the Suit herein does not arise anymore. However for completeness I will address the said issue, regardless.

Whether the Australian Courts would be the appropriate forum of conveniens

To determine the Forum of Conveniens, the following is to be noted:

a) Most of the emails which the Plaintiff relies on to prove its case were issued by the Defendant to individuals in Sime Darby Berhad based in Malaysia as evident from exhibit "A-1" and para 5 of the Statement of Claim;

b) The individuals sought to be relied on as witnesses (recipients of the emails) by the Plaintiff are mainly in Malaysia. Refer to para 10 of the Plaintiff's affidavit in opposition in Enclosure12 A;

c) All necessary evidence to prove the Plaintiff's claim and which is purportedly in support of any defence of the Defendant may have, can be produced in Malaysia;

d) The Defendant's defence with regards to justification in relation to Australian companies and Banks can be proven in Malaysia

by obtaining the necessary documents and witnesses from Australia which documentary evidence and oral testimony can be then admitted in the Malaysian Courts;

e) The Defendant avers that all witnesses to verify the acts, omissions and misfeasance of the Plaintiff are primarily residents of Australia. All documents to prove the Defendant's allegation such as the primary bank loans to banks in Australia, applications to State Authorities, employees of the company who were wrongfully terminated are all in Australia. The Defendant states that she would have to make application in Australia under The Freedom of Information Act for release of information pertaining to this case.

On this, I find that the Defendant have not adduced evidence of such requirement for the applications under the Freedom of Information Act. What is before this court is a bare and unsubstantiated contention that such applications would need to be filed.

Based on the above, there is no credible grounds advanced by the Defendant to justify the fact that the Australian Courts are the appropriate Forum of Conveniens for the Suit herein.

A final point to note is that the Plaintiff is residing in Malaysia and therefore had the statutory right to have his case heard in Malaysia pursuant to section 23 (1) of the Courts of Judicature Act 1964. The case of ***Harrah's Operating Co. Inc (Trading as Harrah's Casino***

Hotel Lake Tahoe & Bill's Lake Tahoe Casion) v Wu Yun Shya Josephine & Another Appeal [2008] 4 MLJ 63 illustrates this point.

Therefore premised on the above reasons the application of the Defendant herein is dismissed with costs.

t.t. Datin Zabariah Mohd Yusof
Tarikh : 1.6.2009

Bagi pihak Plaintif : Encik Mahathir Abdullah
Tetuan Raslan Loong

Bagi pihak Defendan : Dato' Vijay Kumar
Tetuan Kumar, Jaspal Quah & Aishah